

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS PRODUCTS
LIABILITY LITIGATION (No. VI)

: Consolidated Under
: MDL DOCKET NO. 02-md-875
:

VARIOUS PLAINTIFFS

FILED

JAN - 8 2013

v.

: Certain MARDOC cases listed in
: Exhibit "A," attached
:

MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

VARIOUS DEFENDANTS

ORDER

AND NOW, this **7th** day of **January, 2013**, it is hereby **ORDERED** that, pursuant to the Court's Order of September 14, 2012, see No. 02-875 (E.D. Pa. Sept. 14, 2012), ECF No. 1826, and upon review of Defendants' revised Group 3 dismissal lists and Plaintiffs' objections thereto (ECF Nos. 2047 & 2054), it is **ORDERED** that, with respect to the cases listed in Exhibit "A," attached, the evidence presented supports a finding of physical impairment sufficient to overcome a motion to dismiss at this time.¹

¹ The recent history of the maritime ("MARDOC") cases in MDL 875 was set forth in the Court's Corrected Memorandum of August 13, 2012:

On June 27, 2011, the MARDOC cases were referred to the Honorable Elizabeth T. Hey, U.S. Magistrate Judge, for oversight and supervision. On October 4, 2011, both Judge Eduardo C. Robreno and Magistrate Judge Hey signed Administrative Order No. 25 ("AO 25"), with the goal of "facilitat[ing] the expeditious movement of pending cases on the MDL 875 (MARDOC) docket[.]" some of which had been pending for more than twenty years.

AO 25 was created with the goal of streamlining the MARDOC litigation in light of the vast number of cases on the MARDOC docket, and in designing AO 25, the Court used as a model the relevant parts of Amended Administrative Order No. 12 ("AO 12"). AO 25 sets forth not only procedural and filing

requirements, but also ordered that by October 17, 2011, Plaintiffs' counsel were to file a "certification in each plaintiff's case that they have provided all defense counsel in that case (1) a copy of the medical report or opinion containing a physician's diagnosis of the plaintiff with the asbestos-related disease or injury alleged in the complaint." Admin. Order No. 25 at § B(2), No. 02-875 (E.D. Pa. Oct. 5, 2011), ECF No. 552 [hereinafter "AO 25"]. Therefore, Defendants in the present cases have been in possession of Plaintiffs' medical reports or opinions since October 17, 2011, or earlier.

ECF No. 1764 at 3-4 (footnotes omitted).

The Corrected Memorandum was issued to address the motions of several defendants to dismiss thousands of cases on the ground that plaintiffs had not submitted any evidence of injury. As part of the motions certain defendants submitted lists of plaintiffs to whom they asserted the motions applied. Following extensive briefing and argument on the motions, the motions were granted in part and approximately 1,600 cases were dismissed. See ECF No. 1754. The Court ruled as follows with respect to a plaintiffs' burden to show an injury in these maritime asbestos cases:

The Court today decides that a seaman without physical impairments resulting from asbestos exposure, including one who manifests only pleural changes, has not suffered an "injury" under maritime law, and therefore has no cognizable claim.

....

The Court finds that under maritime law, including the Jones Act, a seaman is not "injured" if he does not suffer physical impairment resulting from asbestos exposure. Plaintiffs who have only pleural changes are not "injured." The Court excludes from the "non-injured" category cancer claims, including claims related to "smoking lung cancers," and claims of Plaintiffs who manifest physical injury related to their alleged asbestos exposure.

ECF No. 1764 at 6-7, 30-31.

Plaintiffs sought reconsideration, in part claiming that the lists of cases to be dismissed submitted by certain defendants included many plaintiffs who did provide evidence of impairment. On September 14, 2012, following further briefing and argument, the Court denied the motion to the extent it sought reconsideration of the legal rulings set forth in the Corrected Memorandum, and vacated the dismissal orders, returning all the dismissed cases to the active docket and allowing the parties to submit new proposed dismissal lists after reviewing the

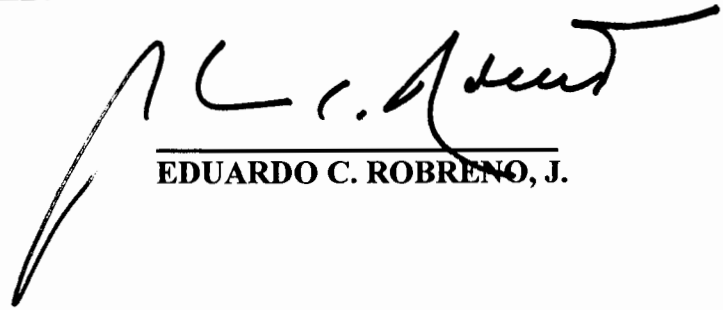
evidence in each plaintiff's case in view of the Corrected Memorandum. See ECF No. 1826. Certain defendants have jointly submitted an amended dismissal list for Group 2, and plaintiffs have submitted their objections. See ECF Nos. 1890, 1891 & 2044.

Defendants submitted 246 names in Group 3 in their amended dismissal list. See ECF No. 2047. Of those, plaintiffs had voluntarily removed 122 from the docket by filing a motion to transfer them to the bankruptcy only docket, which motion was granted in the individual cases on December 3, 2012. See ECF No. 2032. Plaintiffs have objected to dismissal of the remaining 124 cases, and have supplied relevant pages of medical records for each. See ECF No. 2054.

Defendants argue that there is no evidence of impairment within the meaning of the Corrected Memorandum. In the cover letter to their amended dismissal list as to Group 1, they stated that the plaintiffs/decedents at issue have been diagnosed with only pleural disease or interstitial changes, and that the records do not meet the requirements of AO25 "as they do not constitute an appropriate medical diagnosis to satisfy the Court's threshold." Plaintiffs respond in their cover letter by stating that they have submitted evidence of impairment within the meaning of the Corrected Memorandum as to each and every plaintiff/decedent. Specifically, plaintiffs state that they have submitted pulmonary function test (PFT) results that show either (1) a Total Lung Capacity (TLC) less than 80% of predicted value (or below the lower limits of normal), or (2) a Forced Vital Capacity (FVC) less than 80% of predicted value (or below the lower limits of normal) and a ratio of Forced Expiratory Volume in One Second (FEV1) to FVC of greater than or equal to 65%. Plaintiffs maintain that this measure is consistent with the American Medical Association's standards for determining permanent impairment and with court-approved standards applied to asbestos personal injury trusts. Anticipating plaintiffs' reference to these standards, defendants argued in their letter that plaintiffs have failed to show (1) that the PFT's were performed on appropriately calibrated equipment, (2) that the test results meet applicable standards of the American Thoracic Society, (3) that the submitted chest x-rays were pursuant to a physician's order, or (4) that other confounding causes for the test results were considered and eliminated.

The Corrected Memorandum did not hold that all cases carrying a diagnosis of pleural or non-malignant disease should be dismissed. Rather, it held that dismissal is appropriate for a plaintiff who is "without physical impairments resulting from asbestos exposure, including one who manifests only pleural changes." Thus, at this stage of the litigation, it is not for the court to weigh the evidence, but rather to determine if plaintiffs have submitted prima facie evidence of asbestos-related injury or impairment. See In re Asbestos Prods. Liab. Litig., 278 F.R.D. 126, 133 (E.D. Pa. 2011) (denying motion to dismiss brought under Administrative Order 12 in land-based cases where each plaintiff's submission "contain[ed] a diagnosis of a symptomatic asbestos-related disease"). Cf. Glaab v. Honeywell Int'l, Inc., __ A.3d __, No. 2507 EDA 2011, 2012 WL 5194061, at *8 (Pa. Super. Oct. 22, 2012) (plaintiff must present prima facie evidence of discernible asbestos exposure related to a symptomatic asbestos-related condition and that he suffers some functional impairment or disability as a result; reversing grant of summary

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

judgment for defendant where plaintiff developed pleural plaques and thickening and shortness of breath requiring him to rest after brief exertions, which experts related to years of asbestos exposure).

In these cases, examination of documents submitted by the parties show medical evidence of (1) an asbestos-related condition contributing to the cause of death ("D"), (2) lung cancer ("LC") or esophageal cancer ("EC") caused by exposure to asbestos, and/or (3) a non-malignant asbestos-related diagnosis together with results of a pulmonary function test consistent with the guidelines set forth above (either $TLC < 80\%$ predicted value, or $FVC < 80\%$ predicted value and $FEV1/FVC \geq 65\%$) ("PFT"). The Court accepts this evidence as prima facie evidence of impairment. It will be for a later day to determine whether plaintiffs' evidence is sufficient to present to a jury. The attached case list identifies which of these categories (D, LC, EC or PFT) each case falls into.

EXHIBIT A

Name	Civil Action No.	Category
Holtzer, Harold E	09-30474	PFT
Esquilin, Braulio	10-30056	PFT
Fager, Terry W	10-37613	PFT
Abella, Bert L	11-30071	PFT
Alfaro, Abraham	11-30084	PFT
Ali, Rashid	11-30085	PFT
Allen, Willie J	11-30088	PFT
Alnaham, Ali A	11-30090	PFT
Amat, Kadir P	11-30095	PFT
Ancheta, Francisco Q	11-30097	PFT
Arthurs, Peter J	11-30106	PFT
Askew, Allen F	11-30109	PFT
Baker, Kenneth	11-30116	PFT
Bacon, William C	11-30117	PFT
Barnett, Jay W	11-30125	PFT
Basir, Zaine	11-30127	PFT
Benjamin, Cecil H	11-30142	PFT
Bonafont, Ramon	11-30162	PFT
Borders, Michael	11-30167	PFT
Brown, Joe N	11-30187	PFT
Calderon, Fe Domingo R	11-30203	PFT
Calero, Abad B	11-30204	PFT
Camacho, Jesus	11-30208	PFT
Campbell, David C	11-30212	PFT
Capito, Patricio C	11-30214	PFT
Castro Jr., Ambrosio	11-30222	PFT
Celiberti, John	11-30223	PFT
Chacon, Jose A	11-30225	PFT
Colon, Jr., Francisco	11-30241	PFT
Felker, Edwin M	11-30248	PFT
Findahl, Ferdinand N	11-30257	PFT
Frederick, Tomas O	11-30274	PFT
Fuller, Edward	11-30276	PFT
Gabino, Feliciano	11-30278	PFT
Gamble Jr., Lonnie	11-30285	PFT

Gautney, Delbert	11-30296	PFT
Correa, Angel	11-30304	PFT
Cruz, Pablo	11-30319	PFT
Dauzart, Jr., Curley	11-30329	PFT
Davis, George N	11-30334	PFT
Davis, Roger B	11-30338	PFT
Dennis, Joseph L	11-30350	LC
Droz, Manuel	11-30364	PFT
Drumgoole Jr., Bennie	11-30365	PFT
Goodrum, Harold C	11-30376	PFT
Gribbin, Lawrence	11-30387	PFT
Haber, Edward L	11-30399	PFT
Hagner, James F	11-30402	PFT
Echandi, Manuel R	11-30454	PFT
Eden, Anthony G	11-30456	PFT
Edwards, Charlene	11-30457	PFT
Estrada, Raul	11-30466	PFT
Fagan, Robert I	11-30473	PFT
Ayala Ortiz, Ramon	11-30584	PFT
Jacques Jr., Joseph H	11-30637	PFT
Japngie, Charles B	11-30638	PFT
Jensen, Ben O	11-30644	PFT
Johnson Jr., Alfred	11-30649	PFT
Johnson, Leonard S	11-30658	PFT
Joseph, Solomon M	11-30668	PFT
Kidd Jr., Torry	11-30674	PFT
King, Edward A	11-30678	PFT
Bastian, Guillermo O	11-31034	PFT
Castro, Perfecto	11-31055	PFT
Ard, Alvin	11-31219	PFT
Dishinger, Donald M	11-31222	EC
Johnson, Patrick C	11-31268	PFT
Banks Sr., Earl	11-31279	PFT
Burke, George A	11-31284	PFT
Amper, Sofronio L	11-31290	PFT
Chandler, Thomas F	11-31349	PFT
Cunningham, Matthew J	11-31472	PFT

Dampson, Roy T	11-31473	PFT
Gibson, Gordon A	11-31507	PFT
Jardine, Thomas A	11-31544	PFT
Hayes, Elton T	11-31697	PFT
Balbastro, Ernesto L	11-31698	PFT
Hambouz, Halim Y	11-31787	PFT
Haynes, Bobby L	11-31789	PFT
Flores, Reyes	11-31800	PFT
Kirby, Jr., Thomas T	11-31819	PFT
Jenkins, Lester	11-31843	PFT
Branch, Preston	11-31953	PFT
Greene, Keith B	11-31958	PFT
Bonilla, Jose E	11-31973	PFT
Jackson, George N	11-31979	PFT
Caldwell, Robert H	11-31980	PFT
Bouganin, Henry	11-31982	PFT
Galka, Thomas A	11-31988	PFT
Davis, Danny H	11-32012	PFT
Gruber, Thomas W	11-32018	PFT
Hernandez, Salvador	11-32055	PFT
Gillain, Lee E	11-32215	PFT
Hines, Charles M	11-32216	PFT
Gonzalez, Carlos J	11-32217	PFT
Boyer, Joseph D	11-32228	PFT
Hajkowski, Thaddeus	11-32248	PFT
Fore, Aaron	11-32423	PFT
Carmona, Santos	11-32428	PFT
Gullett, Clifton	11-32471	PFT
Donohue, Michael J	11-32527	PFT
Garcia, Cristobal	11-32545	PFT
Clairveaux, Parker V	11-32550	PFT
Bligh, William G	11-32603	PFT
Denyko, John	11-32606	PFT
Frazier, James H	11-32939	PFT
Kirkland, Jr., Isaac	11-32949	PFT
Ayler, Eugene	11-32961	PFT
Garcia, Julio O	11-33004	PFT

Haselden, Robert G	11-33006	PFT
De Brosse, Michael	11-33089	PFT
Badger, Joyce L	11-33091	PFT
Craggs, George M	11-33099	D
Daly, Robert V	11-33164	PFT
Connors, Robert J	11-33288	PFT
Bem, Joel E	11-33292	PFT
Healy, Robert F	11-33421	PFT
Cordes, George H	11-33644	PFT
Hernandez, Serafin	11-33692	PFT
Culpepper, John T	11-33709	PFT
Diaz, Benigno	11-33777	PFT
Aray, Rene	11-33793	PFT
Barber, George Paul	11-33950	PFT
Foster, Walter C	11-58303	PFT